

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CITY OF GRASS VALLEY,	)	
	)	2:04-cv-00149-GEB-DAD
Plaintiff,	)	
	)	
v.	)	<u>ORDER re: IN LIMINE</u>
	)	<u>MOTIONS</u>
NEWMONT MINING CORPORATION, a	)	
corporation; NEWMONT USA LIMITED,	)	
a corporation; NEWMONT NORTH	)	
AMERICAN EXPLORATION LIMITED, a	)	
corporation; NEW VERDE MINES LLC,	)	
a limited liability company,	)	
NEWMONT REALTY COMPANY, a	)	
corporation,	)	
	)	
Defendants.	)	
_____	)	

Defendants move in limine to exclude portions of the testimony of Robert Moran ("Moran") and Keith O'Brien ("O'Brien"), both of whom are Plaintiffs' expert witnesses. Plaintiff opposes the motions. Plaintiff moves "to preclude references to empty chair defendants at trial." Defendants oppose the motion.

**I. Testimony of Robert Moran**

**A. Moran's Testimony Regarding Defendants' Awareness of Potential Liability**

Defendants seek exclusion of Moran's testimony concerning Defendants' alleged awareness of potential liabilities and water contamination in the Grass Valley Area. (Mot. in Limine to Exclude Testimony of Robert Moran ("Moran Mot.") at 3:11-12.) In Opinion 1 of Moran's expert report, he states that "Newmont was aware, since at least the 1980s, that it had potential environmental liabilities with respect to its properties in the Grass Valley Area." (Aff. of Alison Thayer in Supp. of Mot. in Limine to Exclude Testimony of Robert Moran, Ex. A ("Moran Report") at 3.) In Opinion 3 of Moran's expert report, he states that "based on Newmont's experience at many of its other metal mine sites, the corporation was aware that such mine waters probably had chemically reacted with sulfide-rich and metal-laden rock to mobilize hazardous substances resulting in contamination and pollution of the local surface and ground waters." (Id. at 5.)

Expert evidence is admissible under Federal Rule of Evidence ("Rule") 702 if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702. "For an expert's testimony to be admissible under [] Rule [702], [] it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help." Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 708 (2d Cir. 1989); see SEC v. Lipson, 46 F. Supp. 2d 758, 763 (N.D. Ill. 1998) ("Expert testimony

1 may not be used merely to repeat or summarize what the jury  
2 independently has the ability to understand.").

3 Defendants argue that "a determination of what was known by  
4 particular Defendants at any given time is well within the  
5 comprehension of the jury and the Court without the aid of Dr. Moran's  
6 testimony," since his opinion is "based solely upon his interpretation  
7 of 'numerous memos and other documents,' which will themselves be  
8 presented to the jury and the Court." (Moran Mot. at 3:20-22, 4:17-  
9 18; see Moran Report at 3, 5 (stating that Moran's Opinions 1 and 3  
10 are based on "numerous memos and other documents" authored by "Newmont  
11 employees or representatives").) Plaintiff counters that "Dr. Moran's  
12 35 years of experience advising mining companies on environmental  
13 matters makes him uniquely qualified to testify regarding industry  
14 practices and knowledge." (Opp'n to Mot. to Exclude Testimony of  
15 Robert Moran at 5:18-19.) However, Plaintiff has failed to show that  
16 the jury would not be capable of evaluating the evidence and  
17 determining whether and/or when Defendants were aware of potential  
18 environmental liabilities in the Grass Valley area. Therefore, this  
19 portion of Defendant's motion is granted, and Moran's testimony  
20 concerning whether Defendants were aware of potential liabilities and  
21 water contamination in the Grass Valley Area is excluded.<sup>1</sup>

22 **B. Moran's Testimony Regarding Appropriate Environmental Response**

23 Defendants seek exclusion of Moran's testimony regarding  
24 whether Defendants conducted an appropriate environmental response,  
25 \_\_\_\_\_

26 <sup>1</sup> This ruling does not affect the admissibility of Moran's  
27 testimony described in the portion of Opinion 3 stating, "Oxidation of  
28 metal-bearing rocks to generate mine drainage which results in  
contamination of surface and ground waters and potential toxicity to  
aquatic life is a process that has been understood throughout the mining  
industry for more than one hundred years." (Moran Report at 5.)

1 but fail to show they should prevail on this portion of their motion.  
 2 Accordingly, it is denied.

3 **C. Moran's Testimony Regarding Stockholder Rights and Fiduciary**  
 4 **Responsibilities of Corporate Officials**

5 Defendants seek exclusion of Moran's testimony that  
 6 "corporate officials [] have a fiduciary responsibility to their  
 7 stockholders to evaluate and report such actual and potential  
 8 liabilities," since Moran is not an expert on stockholder rights or  
 9 the fiduciary responsibilities of corporate officials. (Moran Mot. at  
 10 6:11-12; Moran Report at 4.) Expert witnesses may not provide expert  
 11 testimony on subjects on which they are not qualified as experts.  
 12 United States v. Chang, 207 F.3d 1169, 1173 (9th Cir. 2000) (holding  
 13 that trial court acted in its discretion in refusing to allow expert  
 14 in history of issuance of counterfeit foreign securities to testify  
 15 regarding authenticity of security certificate at issue "given that he  
 16 had no experience in identifying counterfeit foreign securities").  
 17 Plaintiff has failed to show that Moran is a qualified expert on the  
 18 fiduciary responsibilities of corporate officials. Accordingly, the  
 19 motion on this ground is granted.

20 **II. Testimony of Keith O'Brien**

21 **A. O'Brien's Testimony Regarding Property Interests and**  
 22 **Operation of the Massachusetts Hill Mine**

23 Defendants seek exclusion of portions of O'Brien's testimony  
 24 (1) on the property and other legal interests held by Defendants in  
 25 the Massachusetts Hill Mine and other "underground mine workings" in  
 26 the Grass Valley Area, and (2) on whether any Defendant continued  
 27 operations at the Massachusetts Hill Mine after 1929. (Mot. in Limine  
 28 to Exclude Testimony of Keith O'Brien ("O'Brien Mot.") at 3:12-5:12.)

1 In Opinion 1 of O'Brien's report, he states that "Water from a mine  
2 portal . . . emanates from underground mine workings owned by Newmont  
3 Mining Corporation and discharges onto the WWTP property. . . .  
4 Newmont acquired North Star Mines Company in 1929 after North Star  
5 Mines Company had acquired the Massachusetts Hill Mine in 1894."  
6 (Aff. of Alison Thayer in Supp. of Mot. in Limine to Exclude Testimony  
7 of Keith O'Brien, Ex. A ("O'Brien Report") at 2.) In Opinions 5 and  
8 6, O'Brien states that hazardous substances discharged from "Newmont's  
9 underground mine workings . . . ." (Id. at 21, 25.) In Opinion 7,  
10 O'Brien states that

11 Newmont is solely responsible for the discharge of  
12 hazardous substances contained within the mine  
13 drainage flowing onto the City's WWTP property.  
14 In and around the City's WWTP property, Newmont is  
15 a past, successor, and/or present owner and  
16 operator of underground mine workings and controls  
the mineral rights. . . . Based on my extensive  
review of the available information, there are no  
other sources of mining wastes but for those from  
Newmont.

17 (Id. at 36.) Opinion 8 states in its entirety that "[a]fter Newmont  
18 acquired North Star Mines Company and started operating Empire Star  
19 Mines Company in 1929, Newmont continued mining operations at the  
20 Massachusetts Hill mine." (Id. at 40.)

21 Defendants argue this testimony should be excluded since  
22 O'Brien is not qualified as an expert in the area of property  
23 interests, Defendants' historical operations or "the legal status of  
24 the parties as a past or present 'owner or operator' in this case."  
25 (O'Brien Mot. at 4:17-20, 5:7-9.) O'Brien is a hydrogeologist, and  
26 has not been qualified as an expert in historical property rights.  
27 (See O'Brien Report at 60.) Defendants have shown O'Brien is not  
28 qualified to give expert testimony on whether Defendants own or owned

1 any property right in those mines, or operated those mines after 1929.  
2 See Chang, 207 F.3d at 1173 (holding that expert witness may not  
3 provide expert testimony on subjects on which he is not qualified as  
4 an expert).

5 Plaintiff counters that "[t]he trier of fact needs an  
6 analysis of the voluminous records in this case . . . [and] a context  
7 for evaluating the facts of this case in the context of environmental  
8 investigation and remediation." (Opp'n to Mot. in Limine to Exclude  
9 Testimony of Keith O'Brien ("O'Brien Opp'n") at 9:21-24.) In essence,  
10 Plaintiff argues it is entitled to present summary evidence, and does  
11 not otherwise respond to Defendants' arguments. Defendants' motion is  
12 granted, but this does not reach the aspect of Plaintiff's response  
13 concerning non-expert testimony.

14 **B. O'Brien's Testimony Regarding Plaintiff's Knowledge of the Drew**  
15 **Tunnel Prior to the Excavation Work**

16 Defendants seek exclusion of O'Brien's testimony regarding  
17 when and how Plaintiff first discovered the drainage was emanating  
18 from Drew Tunnel. (O'Brien Mot. at 5:14-16.) O'Brien states in  
19 Opinion 6 that Plaintiff "encountered the drainage emanating from Drew  
20 Tunnel due solely to its work conducted to expand the WWTP. . . . It  
21 was only after preliminary excavation work in the area of the 'spring'  
22 that the true nature of the 'spring' was known." (O'Brien Report at  
23 25.) Defendants argue that "the jury is perfectly capable of  
24 assessing the witnesses' and [Plaintiff's] statements and making its  
25 own determination as to whether [Plaintiff] had knowledge of the Drew  
26 Tunnel prior to the excavation work." (O'Brien Mot. at 6:5-8.)

27 Plaintiff counters that "O'Brien does not intend to offer an  
28 opinion on [Plaintiff's] 'state of mind' . . . but rather intends to

1 offer his opinion that [Plaintiff] 'took due care in addressing the  
2 discharge of hazardous substances . . .' and that the discharge 'was  
3 not reasonably foreseeable' to [Plaintiff]." (O'Brien Opp'n at 5:18-  
4 22.) However, Defendants have shown that O'Brien's testimony on when  
5 and how Plaintiff first discovered the drainage was emanating from  
6 Drew Tunnel should be excluded; therefore, this testimony is excluded.  
7 This exclusion does not reach the points Plaintiff raises above on due  
8 care and reasonable foreseeability.

### 9 **III. References to "Newmont"**

10 Defendants argue that Moran and O'Brien should be precluded  
11 from referring to all Defendants collectively as "Newmont," since  
12 Moran and O'Brien "offer[] no justification for [their] treatment of  
13 all Newmont-related entities as one and there is no basis here to  
14 ignore the corporate form." (Moran Mot. at 7:7-8.) Plaintiff  
15 counters that "Newmont does not itself respect the corporate form,  
16 either in its business dealings or its communications with this Court  
17 . . . ." (O'Brien Opp'n at 11:12-13.) Since it is unclear what  
18 evidence will be developed at trial, and the record is insufficient  
19 for issuance of the requested in limine ruling, the motion is denied.

### 20 **IV. References to Empty Chair Defendants**

21 Plaintiff "requests an order prohibiting evidence or  
22 argument regarding liability of other potentially responsible parties  
23 not identified in the pleadings." (Pl.s' Mot. at 3:15-17.) Plaintiff  
24 argues "Newmont was obligated under [Federal Rule of Civil Procedure]  
25 26(a) to disclose any third parties that it contends were responsible  
26 for the City's harm" and therefore Defendant should not be permitted  
27 to use such evidence at trial under Federal Rule of Civil Procedure  
28

37(c).”<sup>2</sup> (Id. at 4:12:-24.) Plaintiff also argues “the City submitted specific interrogatories and document requests to Newmont asking Newmont to identify persons having knowledge of, and documents related to, property adjacent to the City’s wastewater plant, and control of the Drew Tunnel from 1850 to the present [and Defendants] identified no third parties or evidence showing potential third party liability.” (Id. at 4:24-5:2.) Plaintiff further argues that when it “subsequently sent Newmont specific contention interrogatories, asking Newmont to identify witnesses and documents supporting Newmont’s ‘divisible injury,’ and ‘apportionment’ claims . . . as well as Newmont’s ‘superceding and/or intervening actions of individuals’ claims . . . , Newmont refused to provide substantive responses, asserting: ‘[T]he City has exceeded the number of interrogatories permitted under the federal rules without leave of court or written stipulation.’” (Id. at 5:3-9 (citations omitted).)

Defendants state they “have not asked this Court, and do not intend to ask this Court, to hold nonparties liable as potentially responsible parties, as the City suggests [and] do not intend to attempt to use evidence at trial that was not disclosed during discovery.” (Defs.’ Opp’n at 2:7-10.) Defendants argue that Plaintiff’s motion “is premature, overbroad, and lacks the specificity necessary for this Court to decide what evidence of non-party interests and activities is or is not admissible.” (Id. at 2:18-20.) Defendants further argue “the City cannot point to any evidence that the Defendants ostensibly failed to produce [as required by Rule 26] and now seek to use at trial[, and] Defendants are entitled to

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<sup>2</sup> All subsequent references to Rules are to the Federal Rules of Civil Procedure.



1 introduce at trial any admissible evidence that has been produced in  
2 the course of litigation, even if such information relates to third-  
3 party interests. [Further,] Defendants have complied with all  
4 discovery requests from the City to the extent required by the Federal  
5 Rules." (Defs.' Opp'n at 8:10-20, n.3.)

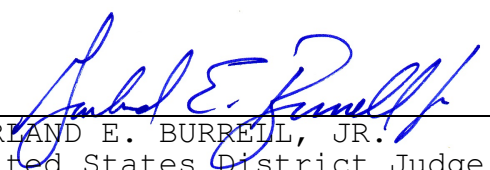
6 This motion is not crystalized enough for decision, and  
7 appears to seek decision on a discovery issue that should have been  
8 resolved earlier in the proceeding. See Weiss v. La Suisse, Society  
9 D'Assurances Sur La Vie, 293 F. Supp. 2d 397, 407-08 (S.D.N.Y. 2003)  
10 (denying motion in limine where "[n]o particular documents or  
11 testimony have been identified"); Freeman v. Allstate Life Ins. Co.,  
12 253 F.3d 533, 537 (9th Cir. 2001) (finding no abuse of discretion  
13 where "[t]he district court declined to [exclude evidence] because  
14 [movant] failed to prosecute the issue before the magistrate judge as  
15 required by E.D. Cal. Local Rule 72-302(c) . . . ."). Therefore, the  
16 motion is denied.

17 Plaintiff also argues, given that "CERCLA is a strict  
18 liability policy," "evidence of non-parties' ownership of title to  
19 property in Grass Valley or potential responsibility for the  
20 contamination at issue in this case would have minimal if no probative  
21 value with respect to liability in this case" and, therefore, should  
22 be excluded as irrelevant evidence. (Pl.'s Mot. at 8:24-9:5.)  
23 Defendants rejoin that evidence of property ownership is relevant to  
24 rebutting duty of care and foreseeability of harm with regards to the  
25 City's negligence claim and "goes directly to whether any Defendant  
26 can be held liable under CERCLA as a past owner or operator." (Defs.'  
27 Opp'n at 4:20-5:11.)  
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1 Evidence should only be excluded in an in limine proceeding  
2 "when the evidence is clearly inadmissible on all potential grounds."  
3 Bouchard v. Am. Home Prods. Corp., 213 F. Supp. 2d 802, 810 (N.D. Ohio  
4 2002). This has not been shown. Therefore, Plaintiff's motion is  
5 denied.

6 IT IS SO ORDERED.

7 Dated: February 26, 2008

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10 GARLAND E. BURRELL, JR.  
11 United States District Judge  
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